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Attorneys for USACM Liquidating Trust

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR¹
Case No. BK-S-06-10729-LBR²

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**THIRD OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED, IN WHOLE OR IN
PART, UPON INVESTMENT IN
PRESERVE AT GALLERIA, LLC
LOAN; AND CERTIFICATE OF
SERVICE**

Date of Hearing: January 22, 2009

Time of Hearing: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 26, 2007.



1 order disallowing the Proofs of Claim filed by individual investors (“Direct Lenders”)
2 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are
3 based upon an investment in the Preserve At Galleria, LLC Loan (the “Preserve At
4 Galleria Loan”). This Objection is supported by the Court’s record and the Declaration of
5 Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the
6 Investment in Preserve At Galleria, LLC Loan filed with the Court today (the “Burr
7 Decl.”).

8 **I. INTRODUCTION**

9 On about September 27, 2006, the borrower paid off the Preserve At Galleria Loan
10 in full. In turn, USACM distributed the proceeds from the Preserve At Galleria Loan to
11 the Direct Lenders who invested in the Preserve At Galleria Loan. The Direct Lenders
12 were thus paid in full, subject to servicing fees and any other charges under their
13 respective Loan Servicing Agreements and this Court’s orders, including the Confirmation
14 Order.

15 Accordingly, this Omnibus Objection seeks an order from the Court disallowing
16 Direct Lender claims to the extent they are based upon an investment in the Preserve At
17 Galleria Loan. To the extent a Direct Lender claim is based upon an investment in a
18 different loan, it will not be impacted by this Objection.

19 **II. JURISDICTION**

20 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
21 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
22 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

23 The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and
24 Bankruptcy Rule 3007.

III. BACKGROUND

1 1. On April 13, 2006 (“Petition Date”), USACM, USA Securities, LLC (“USA
2 Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital Diversified
3 Trust Deed Fund, LLC (“DTDF”), USA Capital First Trust Deed Fund, LLC (“FTDF,”
4 together with DTDF, the “Funds”) (collectively, the “Debtors”), filed voluntary petitions
5 for relief under chapter 11 of the Bankruptcy Code. Debtors continued to operate their
6 businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of the
7 Bankruptcy Code. Debtors’ post-petition management of the Debtors was under the
8 direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC
9 (“Mesirow”), who served as the Chief Restructuring Officer.

10 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
11 business of underwriting, originating, brokering, funding and servicing commercial loans
12 primarily secured by real estate, both on behalf of investors and for its own account.

13 3. That business included the solicitation of individual investors to purchase
14 fractional interest in loans that USACM originated and then serviced. These investors,
15 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in
16 USACM’s bankruptcy case and in this Objection.

17 4. Although USACM serviced and sometimes originated the loans in which the
18 Direct Lenders invested, generally USACM was not a borrower on these loans.

19 5. On September 14, 2006, the Court entered its Order Setting Deadline to File
20 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The Bar
21 Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the
22 deadline (“Bar Date”) for creditors to file proof of claims.

23 6. On September 25, 2006, Debtors served a copy of the Bar Date Order on
24 their service lists [Docket No. 1358]. All Creditors, including the Direct Lenders, were
25 served with a copy of the Bar Date order as well [Docket No. 1358].
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1 7. On November 6, 2006, a stipulation was filed and an order entered extending
2 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket
3 No. 1729].

4 8. On January 8, 2007, this Court entered its Order Confirming the “Debtors’
5 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.
6 2376] (the “Confirmation Order”).

7 9. Under the Plan, the USACM Trust is the successor to USACM with respect
8 to standing to seek allowance and disallowance of Claims.

9 10. Under the Plan, unsecured claims of Direct Lenders against USACM are
10 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in
11 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share of
12 the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,
13 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and
14 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”

15 11. The USACM Trust exists as of the Effective Date of the Plan, which was
16 March 12, 2007. Geoffrey L. Berman is the Trustee.

17 12. **Exhibit A** attached, lists Proofs of Claim filed by Direct Lenders that appear
18 to be based, in part, upon an investment in the Preserve At Galleria Loan. (Burr Decl. ¶ 7.)
19 **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant’s address, the
20 total amount of the claim and the total amount of the claim that appears to be related to an
21 investment in the Preserve At Galleria Loan based upon the information provided by the
22 claimant. (Burr Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the
23 Preserve At Galleria Claims.

24 13. On June 15, 2006, Mesirow Financial Interim Management, LLC filed the
25 original schedules and statements; according to schedule F-1 of the original schedules and
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1 statements several Direct Lenders in the Preserve At Galleria were owed money for
2 unremitted principal. Based on the original schedule F-1, Mesirow created proofs of
3 claims with amounts for unremitted principal preprinted on them and these were mailed to
4 the affected Direct Lenders. Upon further review and reconciliation, Mesirow determined
5 there was no unremitted principal related to the Preserve At Galleria loan. Accordingly,
6 on March 7, 2007, a 2nd amendment to schedule F-1 (which supersedes the original and
7 the 1st amendment to schedule F-1) was filed which changed the scheduled amounts for
8 unremitted principal in the Preserve At Galleria loan to \$0. USACM has previously
9 informed Direct Lenders that the amounts set forth in the prior schedule F-1 have been
10 corrected and superseded by the amounts indicated in the recent investor statements. (Burr
11 Decl. ¶ 8.)

12 14. On or about September 27, 2006, the Preserve At Galleria Loan was paid off
13 in full, as reflected in USACM's books and records. (Burr Decl. ¶ 9.) Shortly thereafter,
14 USACM processed the payoff and distributed the proceeds to the Direct Lenders on the
15 Preserve At Galleria Loan. (Burr Decl. ¶ 9.)

16 15. The Direct Lenders were in turn paid in full for their investment in the
17 Preserve At Galleria Loan, subject to servicing fees and any other charges under their
18 respective Loan Servicing Agreements and this Court's orders, including the Confirmation
19 Order. In general, the Direct Lenders received their principal and interest on the Preserve
20 At Galleria Loan, less sums withheld for servicing fees, servicer advances, Prepaid Interest
21 and sums known as the 2% Holdback pursuant to the confirmed Plan. On the Effective
22 Date of the Plan, the Prepaid Interest was applied, a portion of the 2% Holdback was
23 applied to the allowed claims of the Direct Lender Committee, and the balance paid to the
24 Direct Lenders. (Burr Decl. ¶ 10.)

1 16. Accordingly, the USACM Trust no longer has further obligations to the
2 Direct Lenders arising out of the Preserve At Galleria Loan because, pursuant to
3 USACM's books and records, the Preserve At Galleria Loan has been repaid in full, and
4 the Direct Lenders have received such payment. (Burr Decl. ¶ 11.)

5 **IV. APPLICABLE AUTHORITY**

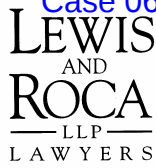
6 1. Under the Bankruptcy Code, any Claim for which a proof of claim has been
7 filed will be allowed unless a party in interest objects. If a party in interest objects to the
8 proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim
9 and shall allow the Claim except to the extent that the Claim is "unenforceable against the
10 debtor . . . under any . . . applicable law for a reason other than because such claim is
11 contingent or unmatured." 11 U.S.C. § 502(b).

12 2. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.
13 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such
14 objections has been extended to February 12, 2008, by this Court's orders.

15 3. A properly filed proof of claim is presumed valid under Bankruptcy Rule
16 3001(f). However, once an objection to the proof of claim controverts the presumption, the
17 creditor ultimately bears the burden of persuasion as to the validity and amount of the
18 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,
19 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate
20 burden of proof as to the validity of a proof of claim "remains at all times upon the
21 claimant." *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039
22 (9th Cir. 2000).

23 **V. OBJECTION TO CLAIMS LISTED IN EXHIBIT A**

24 1. **Exhibit A** attached hereto and incorporated herein by this reference contains
25 the list of the Preserve At Galleria Claims. The USACM Trust objects to each of these
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1 claims to the extent it is based upon an investment in the Preserve At Galleria Loan
2 because, pursuant to USACM's books and records as reconstructed by Mesirow, the
3 Preserve At Galleria Loan has been repaid in full, and the Direct Lenders have received
4 such payment, as provided by the applicable Loan Servicing Agreement, this Court's
5 orders and the Confirmation Order.

6 2. Certain of the Preserve At Galleria Claims may be the subject of subsequent,
7 and perhaps multiple, objections if they are being asserted on the basis of multiple
8 investments through USACM. Such Claims may also be subject to prior or subsequently
9 filed objections, and this objection is without prejudice to any other objection by any party
10 in interest, including the USACM Trust.

11 3. The USACM Trust reserves the right to further object to any and all Claims,
12 whether or not the subject of this Objection, for allowance and/or distribution purposes on
13 any other grounds. The USACM Trust further reserves the right to modify, supplement
14 and/or amend this Objection as it pertains to any Claim or claimant herein.

15 4. For the convenience of the Court and the parties, the USACM Trust will
16 endeavor to file any subsequent objections to the Claims on a loan by loan basis. Thus, this
17 Objection is one of a series of many potential objections to those Claims that are asserted,
18 in whole or in part, on the basis of an investment that has been repaid in full.
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1 **VI. CONCLUSION**

2 The USACM Trust respectfully requests that the Court disallow the claims listed in
3 **Exhibit A** to the extent those claims are based upon a Direct Lender investment in the
4 Preserve At Galleria Loan. The USACM Trust also requests such other and further relief
5 as is just and proper.

6 Dated: December 3, 2008.

7 LEWIS AND ROCA LLP

8
9 By /s/ John Hinderaker (#18024)
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18 *Attorneys for the USACM Liquidating Trust*

14 Copy of the foregoing mailed by first class
15 Postage prepaid U.S. mail
16 On December 3, 2008 to:

17 All parties in interest listed on
18 Exhibit A attached

19 /s/ Renee L. Creswell
20 Renee L. Creswell